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## PAYMENT OF BILL OF EXCHANGE OR CHECK BY THE DRAWEE AFTER THE DRAWER'S DEATH.

THE death of the drawer of a bill of exchange or check does not prevent the payment thereof by the drawee after that event from being a good payment as against the personal representative of the drawer, whether at the time of the payment the drawee had notice of the death or not.

The weight of authority supports this view.

In *Billings v. Devaux*<sup>1</sup> it was held that the payee of a bill of exchange could recover from the drawee who accepted after the drawer's death. Tindall, C. J., said : —

"I am not aware of any principle of law by which, upon the death of the drawer of the bill, the rights and liabilities of the parties thereto were at all varied."

In *Cutts v. Perkins*<sup>2</sup> it was held that the consignee of a ship's cargo, who, after the death of the master, accepted and paid a bill of exchange drawn by the master for the freight, was not liable to the administrator of the master in an action for the freight, although when he accepted he knew of the death and the master was insolvent at the time of his death.

In *Lewis v. International Bank*<sup>3</sup> the administrator of the drawer of a check, who had committed suicide, brought an action against the drawee for the drawer's deposit, and the payee of the check was made to interplead, and it was held that the payee was entitled to the amount of the check paid into court by the drawee.

"The death of the drawer of a check before its presentation does not operate as a revocation of the check."<sup>4</sup>

"It should seem that where a bill has been drawn in payment of a debt from the drawer to the payee, the drawee may legally accept the bill after notice of the death of the drawer, such death not revoking the order given in favor of a *bona fide* creditor."<sup>5</sup>

<sup>1</sup> 3 Man. & Gr. 565.

<sup>2</sup> 12 Mass. 206.

<sup>3</sup> 13 Mo. App. 202.

<sup>4</sup> Am. & Eng. Enc. of Law, 1st ed. vol. 5, p. 137.

<sup>5</sup> Chitty on Bills, \*282. See, also, id. \*287; Daniel on Negotiable Instruments, §§ 491, 498 a, 1618 b; article by Daniel in Bankers' Magazine of N. Y., Feb'y, 1879, p. 619; 1 Parsons on Notes and Bills, 287 (2d ed.); Story on Bills of Exchange, § 250; Thomson on Bills of Exchange, 216 (see id. 244); 1 Edwards on Bills, § 568 (3d ed.).

*Contra.* "There is no express adjudication on this point, but the text-writers, with

This must be so because of the nature of the bill or check, the death, and the relation of the parties.

The drawee is indebted to the drawer, and by the bill or check the drawer orders him to pay the whole or a specified part of that indebtedness to the payee named in the instrument. Such order is made and completed by the delivery of the bill or check to the payee. How, then, can the death of the drawer countermand such order and undo his completed act?

It is true that the drawer may countermand such order by acts showing his intention so to do, made known to the drawee before payment by him, as in the common instance of the drawer of a check stopping its payment by notice to the drawee.<sup>1</sup>

But in order to effect this result, it is necessary that the drawer should take some action showing such intention. Death is not action by the person dying, for in dying one is merely passive and not active. And this is true even in the case of suicide, for although the act of the suicide causes his death, his death is due to the force of the laws of nature to which he must submit; and although he puts those laws in operation, he is, in the end, passive only.<sup>2</sup>

Such intention cannot be inferred in any case from the death itself.

The order to the drawee not being countermanded by the drawer's death itself, notice of that event to the drawee cannot countermand the order. Notice of an ineffective event cannot make it effective.

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perhaps one or two exceptions, state that the death of the drawer countermands or revokes the authority of the drawee to pay the check unless it has been certified." Am. & Eng. Enc. of Law, 2d ed. vol. 5, p. 1079. "In regard to checks on bankers, it is considered that the death of the drawer is a countermand of the authority of the banker to pay." V. C. Sandford in *Smith's Ex'r v. Wyckoff*, 3 Sandf. 77. See, also, Byles on Bills, \*20, \*23, \*178; 2 Parsons on Notes, 82; Morse on Banks and Banking (2d ed.), 278; id. (3d ed.) § 400; *Burke v. Risley*, 27 La. An. 465, *semble*; Commercial Precedents 1892 (selected from Journal of Commerce, N. Y.), p. 101, No. 35; 2 Edwards on Bills, § 739 (3d ed.).

In *Drum v. Benton*, 13 App. Cas., D. C., 245, 261, Alvey, C. J., said *obiter*: "It has been held in several cases, and laid down as a settled principle by text-writers of authority, that the death of a drawer of a check operates as a revocation of the authority of the bank or banker upon which it is drawn to pay it, though it is clear that if the check be presented and paid before notice of the death the payment is good. . . . The first branch of this general proposition may admit of some doubt upon the more recent authorities."

<sup>1</sup> Chitty on Bills, \*429; *Freund v. Importers & Traders Nat. Bank*, 3 Hun, 689.

<sup>2</sup> *Lewis v. International Bank*, 13 Mo. App. 202, is a case of suicide of the drawer of a check.

Much confusion of thought is shown by the attempt of judges and writers of text-books to apply the well-settled rule that the death of a principal revokes the authority of his agent, and the exception thereto that the authority is not revoked by the principal's death if coupled with an interest, to the case of the payment of a bill or check by the drawee after the death of the drawer.

It is obvious that the law of agency is in no way applicable to such a case, as neither the drawee nor the payee is the agent of the drawer. The drawee in paying and the payee in receiving act each for himself and not as the representative of the drawer. The drawee is simply discharging the whole or a part of his indebtedness to the drawer, and the payee is merely receiving the whole or a part of the drawer's indebtedness to him. One man can pay another's debt (with his consent) without being his agent.

It has been often said that the death of the drawer revokes the *authority* of the drawee to pay the bill or check. This of course would be the effect of the death if the check was merely such an authority, but such an authority is not a bill or check.<sup>1</sup>

An instrument, in order to be a bill or check, must contain an *order* by the drawer to the drawee to pay to the payee, and such order is a very different thing from an authority to the drawee to pay and to the payee to receive. An authority given by one person to another enables the latter to act for the former, and makes the acts done pursuant to such authority the acts of the person who gave the authority. It is absolutely essential, therefore, for the exercise of such authority that the person who gave the authority should be alive at the time of its exercise, for if he is then dead, the acts of the other cannot be his acts, for a dead man cannot act.

This is not the place to attempt to point out the reasons for the exception to the rule above mentioned, but the guess may be expressed that in the cases where it has been held that an authority was not revoked by the death of the person who gave it, because coupled with an interest, its exercise affected some property, an interest in which had been conferred on the person to whom the authority was given and its exercise enforced or disposed of such interest. If so the party exercising the authority was really acting for himself, and the exception is no exception.<sup>2</sup>

An authority may be likened to an electric current, passing from one point to another, which requires for its use at the latter point the existence of the source and the continuance of the flow of

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<sup>1</sup> 2 Ames's Cases on Bills and Notes, 826; 1 id. 5.

<sup>2</sup> Hunt v. Rousmanier, 8 Wheat. 174.

power therefrom, and which ceases with the termination of its source.<sup>1</sup>

Now an order is merely a direction by one person to another to do a specified thing. Once given it is a completed thing, and requires no further support. If the thing to be done is from its nature the act of the person giving the order, the order is really nothing but an authority, but if the act directed to be done is the act of the person to whom the order is given, it is not an authority, nor is any authority to be implied from it, nor is any authority necessary for the execution of the order. The order simply attaches certain consequences to the doing of the act directed to be done, as in the case of the payment of a bill or check by the drawee, the order makes the payment to the payee a payment of the whole or a part of the indebtedness of the drawee to the drawer.

It is because the drawer ordered the payment that he is estopped from saying that it was improperly made, not because it was made by his agent and consequently his own act.

It necessarily follows that the person to whom the order is given in such a case can do the act directed to be done by him, it being his own act, notwithstanding the death of the person giving the order prior to its execution. So although the death of the drawer would revoke any authority conferred by the bill or check on the drawee or payee, it does not countermand the order to the drawee to pay to the payee.

It is to be regretted that the reasons found in the books for this position are open to criticism. These reasons are : —

(1) That the bill or check is an assignment, *pro tanto*, of the drawer's funds in the hands of the drawee.<sup>2</sup>

(2) That the authority of the drawee to pay or of the payee to receive the amount of the check is coupled with an interest and therefore not revoked by the drawer's death and notice of it.<sup>3</sup>

That a bill or check is not an assignment of any funds in the hands of the drawee or of any claim against the drawee has been so often shown to be in accordance with principle, and is so strongly supported by the weight of authority, argument or citation of authority in support of that position is not called for here.

<sup>1</sup> See Slosson, *arguendo*, in Wallis v. Pres., etc. Manhattan Co., 2 Hall, 495 (N. Y.).

<sup>2</sup> Lewis v. International Bank, 13 Mo. App. 202; Cutts v. Perkins, 12 Mass. 206; Chitty on Bills, \*282, \*287, note; Byles on Bills, \*20; Thomson on Bills of Exchange, 244.

<sup>3</sup> Lewis v. International Bank, 13 Mo. App. 202; Daniel on Negotiable Instruments, § 1618 b; article by Daniel in Bankers' Magazine of N. Y., Feb'y, 1879, p. 619; Cutts v. Perkins, 12 Mass. 206.

It must, however, be admitted that the law is settled to the contrary in some jurisdictions. Of course in those jurisdictions the death of the drawer does not affect the right of the drawee to pay to the payee or of the payee to receive such payment, for the death of the assignor of a chose in action does not cancel the assignment or operate as a re-assignment thereof to the personal representative of the deceased assignor.

There are also some decisions in jurisdictions in which a bill or check is not considered an assignment, holding that the instrument before the court was in effect an assignment, because, although somewhat similar in form to a bill or check, it was made payable out of a specified fund. Of course the death of the drawer of such an instrument would not affect it.<sup>1</sup> The bill, check, or instrument being held an assignment by the drawer, the drawee is not only justified in paying the payee after the drawer's death, but may be sued by the payee if he refuses to make such payment.

In respect to the second reason above mentioned, in addition to what has already been said, to the effect that the law of agency has no application to the rights of the parties to a bill or check, it is necessary to say only that if the drawee has an authority to pay the bill or check, or the payee has an authority to receive payment, such authority is not coupled with an interest. No interest in any property of any kind is given to either drawee or payee. How can it be to the interest of the drawee to pay out money? He gains nothing by the payment to the payee. He is merely paying the whole or part of what he owes the drawer. He could just as well pay to the drawer himself as to the payee. Nor has the payee any interest in the exercise of the supposed authority. He receives nothing that he would not have been entitled to if the bill or check had never been drawn. It gives him no right or claim against the drawee; it gives him no additional security, and he gains nothing by taking it.

The reasons given in the books for the opposite view are even more unsatisfactory. They are :—

(1) That the authority of the drawee to pay is revoked by the death of the drawer.<sup>2</sup>

(2) That on the drawer's death, his funds in the hands of the drawee pass to his personal representative and are no longer payable on his order.<sup>3</sup>

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<sup>1</sup> *Cullis v. Perkins*, 12 Mass. 206, is such a case.

<sup>2</sup> See note 5, *supra*, p. 588.

<sup>3</sup> *Morse on Banks and Banking*, 2d ed. 278; id. 3d ed. § 400.

As to the first of these reasons it has been pointed out above that a bill or check is more than an authority to the drawee to pay, and that the order it contains survives the drawer's death.

The second reason is insufficient, because the personal representative of the drawer is in law the same person as the drawer, his order survives his death, and is in law the order of his personal representative. If it was not in law his order he could not countermand it, as no one can countermand an order not his own, but of course the personal representative of the deceased drawer can stop payment of the bill or check by notice to the drawee not to pay it.

In England the law on this question has been changed as to checks by the Bills of Exchange Act, 1882, 45 & 46 Vic. chap. 61, § 75, which is as follows :—

“The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment; (2) notice of the customer's death.”

In Massachusetts by statute the drawee may pay a demand draft or check notwithstanding the death of the drawer, if it is presented within ten days after its date.<sup>1</sup>

There may be legislation affecting this question in other states.

All the authorities agree that payment by the drawee after the drawer's death, but before notice of that event, is a good payment as against the personal representative of the drawer.<sup>2</sup>

This is so because the order to pay to the payee is not countermanded by the drawer's death. If the bill or check was only an authority to the drawee to pay and to the payee to receive, it would cease at the instant of the death, and the payment thereafter would not be good. An agent's authority ceases on the death of his principal before he has notice of it, and any act done by him as agent after the death is unauthorized and not binding on his principal's personal representative (Mechem on Agency, § 245). It is clearly inconsistent to hold that payment before notice of the death is good and payment after such notice bad. Neither can be good if dependent on an authority. Both must be good because the order survives the death.

The payment being made pursuant to the existing order of the

<sup>1</sup> Chap. 210, General Laws of Mass. of 1885.

<sup>2</sup> Chitty on Bills, \*429; Byles on Bills, \*23; Daniel on Negotiable Instruments, § 1618 b; 2 Pars. on Notes and Bills, 82; Morse on Banks and Banking, 2d ed. 278; id. 3d ed. § 400; Tate v. Hilbert, 2 Ves. Jr. 111, *semble*; Brennan v. Merchants', etc. Bank, 62 Mich. 343, 346, *semble*; Drum v. Benton, 13 App. D. C. 245, 261, *semble*; Am. & Eng. Enc. of Law, 2d ed. vol. 5, p. 1079; 2 Edwards on Bills, § 739 (3d ed.).

drawer there seems to be no more reason for holding that, if the drawer was insolvent at the time of his death, his personal representative could recover from the payee the amount so paid, on a *quasi* contract, founded on the rule forbidding unjust enrichment of one at the loss of another, leaving the payee to share *pari passu* with the other creditors of the drawer, than in a case where the payment was made before the drawer's death, and surely in that case the payee cannot be made to repay the amount received by him from the drawee.

It must be admitted that it is the almost universal practice of merchants and bankers to refuse to pay a bill or check when they have notice of the drawer's death.

They run little or no risk in so refusing, for the drawee of a bill is under no obligation to pay the same, even though he have funds of the drawer in his hands, and though a bank or banker is liable in damages for refusing to pay a check of a customer, having sufficient funds on deposit for that purpose, the damages would be nominal only where the refusal was after the customer's death. A dead man's credit cannot be injured.

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